

Five Approaches to Reforming the Law: 650 Years of Treason and Sedition

AUSTRALASIAN LAW REFORM AGENCIES CONFERENCE 2006: KEYNOTE ADDRESS BY THE HON M E J BLACK AC, CHIEF JUSTICE OF THE FEDERAL COURT OF AUSTRALIA ON TUESDAY, 11 APRIL 2006*

As a judge, I greatly appreciate the value of the scholarly work undertaken by law reform agencies.

The Australian Law Reform Commission (ALRC) is the law reform agency with which I have the closest acquaintance. It is of course a federal body and one with which the Federal Court of Australia has had a lengthy and multi-faceted relationship.

Unsurprisingly, since the ALRC is concerned with federal law, the Federal Court's own procedures and jurisdiction have been amongst the many objects of its inquiries.¹ Moreover, judges of the Court have, in the past, served as Presidents of the ALRC² and three members of the Federal Court are presently part-time Commissioners³; in a sense, the Court provides the ALRC with some of its resources. The Court has been the direct beneficiary of a good number of the hundred or so reports the Commission has produced over the past 30 years. Some of the Federal Court's specialized jurisdiction has been

** I am very grateful for the assistance of my associate, Mr Chris Young, LLB (Hons) (Monash), LLM (Hons) (Cantab) in the preparation of this address.*

*1 See eg ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).*

2 Justices Kirby, Connor and Wilcox.

3 Justices Kiefel, Weinberg and Kenny.

conferred as a consequence of ALRC reports, the jurisdiction in Admiralty being an obvious and early example.⁴

So, it gives me particular pleasure to take part in the opening of the 2006 Conference of Australasian Law Reform Agencies, organised by the ALRC and attended by a very distinguished body of Australian and international law reformers. The topic of my address today suggested itself. One of the ALRC's most important current references – indeed one of its most important references generally – requires it to review the recent amendments to the Commonwealth's sedition laws⁵ and yesterday was the closing date for submissions in response to the Issues Paper the ALRC has prepared for the sedition reference.⁶ In an age in which the law and national security intersect, controversially, once again and in an area where there has been a long history of law reform I thought it might be of interest, and of some value, to examine how law reform in the related fields of sedition and treason has developed over the centuries.

My aim, this morning, therefore, is to consider, within the framework of treason and sedition, the main modes of law reform, to note some of their strengths and weaknesses and to draw some conclusions about the modern model of law reform agency that the ALRC represents. It may surprise some of those present when this historical survey reveals that law reform is nearly as old as the common law itself.

By taking an historical approach to the subject I am following a path often taken by the ALRC itself. Lamentably, many Australian law schools seem to lack interest in teaching legal history, and little interest even in the broader history of our institutions. In contrast,

⁴ *The Commission's outstanding report on Civil Admiralty Jurisdiction, Report No 33 (1986), (implemented by the Admiralty Act 1988 (Cth)) was, and remains, especially influential in this specialised field.*

⁵ See *Anti-Terrorism Act (No 2) 2005 (Cth), schedule 7.*

⁶ *ALRC, Review of Sedition Laws, Issues Paper 30 (2006) (the Issues Paper).*

the ALRC and many of its counterparts, devote considerable and scholarly attention to the history of the law in the areas relevant to their inquiries and references. Although law reform looks to the future, it seems to me impossible to understand the existing law adequately in isolation, or – worse – in ignorance, of its history. The ALRC’s Issues Paper for its sedition reference is a good illustration of the value and the relevance of legal and constitutional history, and some of the historical examples to which I will make brief reference are taken from that very illuminating Issues Paper.

Any survey of more than 650 years of law reform must be selective, but I have selected vignettes of our legal history to highlight what seem to me to be some of the strengths and weaknesses in the processes of law reform that have impacted upon the law of treason and sedition over the centuries. I have been able to identify five processes of law reform that have interacted in the fields of treason and sedition. There is also at least one interesting hybrid.

Let me first say something about the offences of treason and sedition.

Treason was an offence at common law before the enactment of the *Statute of Treasons* in 1351 in the reign of Edward III.⁷ The Statute defined the offence by reference to acts directed against the Sovereign. In Australia, the offence of treason under the laws of the Commonwealth was originally enacted in the *Crimes Act* in 1914⁸ and, since 2002, the offence has been provided for in the *Criminal Code*.⁹ The Commonwealth provisions make it an offence to cause the death of, or harm to, the Sovereign, the heir apparent, the Governor-General or the Prime Minister.¹⁰ It is also, of course, treason to levy war

⁷ 25 Edw III, stat 5, c 2

⁸ *Crimes Act 1914 (Cth)*, s 24.

⁹ *Criminal Code Act 1995 (Cth)*, s 80.1.

¹⁰ The inclusion of the Prime Minister in these provisions marks an interesting and recent constitutional shift in Australia.

against the Commonwealth or to assist the enemy. These modern provisions largely reflect the 1351 statute although, as we shall see, the boundaries of treason have expanded and contracted over time.

Historically, “sedition” has involved the doing of an act, or the oral or written publication of words, with a seditious intention¹¹ A seditious intention was an intention, amongst other things to bring the Sovereign into hatred or contempt, to excite disaffection against the Sovereign or to incite disaffection against the Government, the Constitution or the Parliament. Stated in this broad summary way the potential breadth of sedition is startling and the nature of the offence makes it clear why it is said that the crime “frequently precedes treason by a short interval”.¹²

The new Commonwealth sedition laws, which the ALRC is reviewing, refer to “a person urg[ing] another person” to use force or violence to secure a particular end, such as the overthrow of the Constitution or Government or interference in Parliamentary elections.¹³

Because of the close historical relationship between treason and sedition, and because the scope of the offence of treason has sometimes been expanded to encompass what would now be considered sedition, my outline historical survey will include both. To provide an historical reference point for sedition – the later of the two offences – I note that it is often claimed that “seditious libel” was created, as a criminal offence, in 1606 by judicial decision of the Court – for it was a court – of Star Chamber.¹⁴

What then are the modes of law reform that we see illustrated during the 650 years over which treason and sedition have attracted the attention of reformers?

¹¹ See Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences*, Working Paper No 72 (1977) at [68]; *Issues Paper* at [2.2]-[2.3].

¹² *R v Sullivan* (1868) 11 Cox CC 44 at 45 (Fitzgerald J) cited in *Issues Paper* at [2.9].

¹³ *Criminal Code Act 1995 (Cth)*, s 80.2.

¹⁴ *De Libellis Famosis* (1606) 5 Co Rep 125a; *Issues Paper* at [2.12].

It will be apparent that I am using “law reform” here in a broad sense. Debate over the meaning of the phrase continues and no doubt it always will. I want to avoid the sense of law reform that carries connotations of “improvement” or “progress”, noting the “highly contested and question-begging character”¹⁵ of that concept. For present purposes, I think we need only identify that significant “change” has occurred and ask questions about the context and process of the change. Likewise, I do not think it useful to adopt a narrow sense of the *process* of law reform. It is appropriate to speak of law reform by Parliament and law reform by a Royal Commission or by any other agency. Plainly, a Royal Commission or a law reform agency does not reform the law by itself – some implementing act is required, usually and typically by Parliament. The mechanism of change is not the focus here, rather it is the process by which the nature and scope of the change is determined.

Most obviously, reform of the law of offences against the government has been undertaken by the Parliament. From the enactment of the *Statute of Treasons* in 1351 – itself an instance of law reform by codification – the early history of the law of treason, particularly during the Tudor period, reveals the enactment of statutes; first to *broaden* the scope of treason and then, to repeal what subsequent generations saw as the “cruel and bloody laws of King Henry the eighth ... Draco’s laws, which were written in blood.”¹⁶ The Australian context is represented by the sedition provisions inserted into the *Crimes Act 1914* in 1920¹⁷ and the recent *Anti-Terrorism Act (No 2) 2005*, which repealed the 1920 provisions and inserted new sedition laws into the *Criminal Code*. (There are of course much earlier colonial and State laws about treason and sedition, and the application of Imperial law too. Interestingly, in New South Wales, the Act of 1351

¹⁵ David Brown, “Challenges to Criminal Justice Reform” in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) at 344.

¹⁶ Quoted in *R v Throckmorton (1554) 1 St Tr 869 at 896* as cited in Baker, *Oxford History of the Laws of England*, vol VI at 587.

¹⁷ *War Precautions Repeal Act 1920 (Cth)*, s 12.

is continued in force – still.¹⁸⁾

Reform has also been effected through judicial decision, at times by expanding the scope of treason to extend to the constructive “imagining” or “compassing” of the death of the Sovereign by such acts as magical prophecies about the King’s life expectancy and, at other times, through a judicial refusal to expand the concept of treason in ways such as these. As I have mentioned, the Court of Star Chamber was also responsible for the development of seditious libel by judicial decision. In Australia, the Eureka trials of 1855 provide an early instance of prosecution for sedition and several instances of prosecution for treason. Much later, the prosecution of members of the Australian Communist Party in 1949 provided the occasion for the High Court to consider the validity and scope of the sedition laws of the Commonwealth.

We should not forget that for a brief moment in the legal history of England, law reform was also effected by revolution. Geoffrey Robertson QC has recently chronicled the life of John Cooke, who prosecuted Charles I for “tyranny”, only to himself be executed for treason a few years later.¹⁹

The other two law reform processes that I will touch on are reform by Royal Commission – the Hope Royal Commission was established in 1984 to review national security offences relevant to ASIO – and reform by *ad hoc* committee, such as occurred with the establishment of a committee chaired by Sir Harry Gibbs in 1991 to review Commonwealth criminal law. There is of course one other – the fifth. This is the modern law reform commission. I will speak about that later, and also about an

¹⁸ *Crimes Act 1900 (NSW)*, s 16. It seems not to be an offence under the law of treason of NSW to levy war against the Commonwealth, at least as such. In Victoria, the position is otherwise: *Crimes Act 1958 (Vic)* s 9A(1)(c)-(e); *Issues Paper* at [4.21].
¹⁹ Geoffrey Robertson, *The Tyrannicide Brief* (2005). In the version of this paper delivered at the Conference, I flirted with the idea of revolution as a form of law reform but did not develop the idea, observing instead that it would make an interesting study for a doctoral thesis.

interesting hybrid.

Histories of the law of treason usually begin in 1351 with the *Statute of Treasons*. I want to start 4 years earlier – in 1347 – with the case of John Gerberge, a knight of Hertfordshire. In his posthumous publication, *History of the Pleas of the Crown*, Sir Matthew Hale – who had been Chief Justice of the King’s Bench and who had earlier been the head of an interregnum law reform commission of 1652 – recounted that Gerberge rode his horse, armed with his sword drawn in his hand and assaulted and took William de Botelisford and detained him till he paid him a certain sum of money and took away his horse.²⁰ Was this treason?

With Sir William Blackstone, we can agree that this is a crime well deserving of punishment,²¹ but one that seems to have quite a different complexion than treason. The knight was, however, charged pursuant to the “ancient common law” with “accroaching the royal power”, a species of treason – presumably on the ground that is only for the Crown to demand money on pain of physical force – which Hale, Blackstone and numerous other commentators rightly condemned as an indeterminate and unclear concept that allows for any government to degenerate into arbitrary power.

Hale tells us that this judgment troubled the Commons in Parliament and that petitions were presented that attacked the King’s treason policy.²² The end result of this disquiet was the *Statute of Treasons* – an instance of Parliamentary law reform – making treason the first offence to be defined and codified by statute.

The Act defined many forms of treason, the principal three being:

(1) Compassing or imagining the death of the King;

²⁰ Hale, *History of the Pleas of the Crown* vol I at 80.

²¹ Blackstone, *Commentaries on the Laws of England*, Bk IV, ch 6 at 76.

²² Hale, *above* n 20 at 80.

- (2) Levying war against the King in his realm; and
- (3) Adhering to the King's enemies.

A fourth may be noted for interest: "slaying the Treasurer, chancellor or judges while sitting in court".²³

The Act also provided that any further definitions for cases not covered by its provisions would be made by Parliament. If such a case came before a judge, he was to "tarry without going to judgment" and the matter was to be referred to Parliament.

The *Treason Act* came about following petitions for reform. By defining the forms of treason, it was intended to give certainty and clarity to the most significant capital criminal offence in the realm. The Act also purported to remove from judges the power to define treason and to allow the concept to be expanded only by further legislation. As an instance of Parliamentary law reform, it would appear to be a positive one.

The subsequent history is, however, chequered. Despite its limiting provisions, the scope of the law was nevertheless broadened – by what came to be called "constructive treason" – through judicial interpretation. As well, the clause that purported to require further expansion to be effected by Parliament, combined with the sovereignty of the Parliament, led to Bills of Attainder and to subsequent statutes that expanded the scope of the offence.

The great legal historian Sir John Baker has described the series of statutes that expanded – "reformed" – the scope of treason under King Henry VIII as "the most

²³ *Slaying judges in court would still be an offence under the NSW law of treason, but would not be treason under Commonwealth law.*

repressive body of penal legislation ever passed in England.’²⁴

For example, the *First Succession Act of 1534* declared it treason to, amongst other things, act or write anything to the prejudice, slander, disturbance, and derogation of the King’s marriage to Anne Boleyn. Henry had, of course, divorced his first wife, Katharine of Aragon, in circumstances that would change the course of history. But, as Sir John Baker points out, “the statute required rapid alteration in 1536 when that marriage came to a bloody end”²⁵ and it then became treason to slander the King’s marriage with Queen Jane.

In 1534, a second Treason Act was passed which made it possible to commit treason by words alone – something that went well beyond the common understanding of the 1351 Act. Moreover, the treasonous words could be a private expression of opinion. Sir Thomas More was convicted pursuant to this statute, and executed, for giving evasive answers under interrogation about the King’s position as the supreme head of the Church in England.

A later statute of 1541 – which attainted the King’s fifth wife of treason by sexual misbehaviour – made even silence treason. So, if someone failed to disclose to the King the sexual incontinence of a woman about to marry him, it was treason.

This further series of statutes – passed in response to specific problems facing the Sovereign – certainly does not enhance the reputation of the parliaments of Henry VIII.

These Acts extending the reach of treason were, however, repealed in 1547 upon the

²⁴ Baker, *Oxford History of the Laws of England*, vol VI at 587. The following discussion of those statutes is drawn from Professor Baker’s work at 585-587

²⁵ *Ibid* at 585.

death of Henry VIII, as having been “very strait, sore, extreme and terrible”.²⁶

Obviously enough, Parliaments reform the law. In speaking, in the present context, of Parliaments as instruments of law reform I have in mind, however, the reform without prior report by a law reform agency, royal commission or board of inquiry.

Of course, reforms by the Parliament can themselves vary in process from those effected through the ordinary processes of parliamentary debate, without more, to those that follow close scrutiny by parliamentary standing committees or select committees. Not infrequently the committee processes involve public invitations to make submissions, public hearings and much careful deliberation. The history of reform of the laws of treason and sedition provides us with examples of all these processes. But what distinguishes all of them from other modes of law reform is that they are essentially and directly part of the political process, even when the outcomes are bipartisan.

The two main instances of law reform by the legislature to the Australian law of sedition occurred in 1920 and 2005. The sedition provisions inserted into the Commonwealth *Crimes Act* in 1920 repeated, in substance, the extant common law definition of the offence, although as the ALRC’s Issues Paper notes, they were “somewhat broader”²⁷ in that they did not require proof of the accused’s subjective intention and did not require incitement to violence or public disturbance. The Issues Paper also refers to suggestions that the enactment of the first federal sedition provisions was prompted by concerns about the Bolshevik Revolution and its impact on radical socialist activity in Australia.²⁸

²⁶ 1 *Edw VI, c 12*.

²⁷ *Issues Paper at [2.25]*.

²⁸ *Ibid at [2.28]*.

Late last year, in response to concerns about terrorism, the Attorney-General introduced a Bill into the Parliament for an Act which, amongst other things, repealed the sedition provisions in the *Crimes Act* and enacted new sedition laws in the *Criminal Code*. It is now a criminal offence to “urge” the overthrow of the Constitution or the Government; urge interference in Parliamentary elections; to urge violence within the community; to urge a person to assist the enemy; and to urge a person to assist those engaged in armed hostilities against the Australian Defence Force.

The early examples highlight a general concern that reform by legislation passed in response to specific events may have a much broader potential than was intended and may have other unforeseen consequences. In such circumstances the utility of a dispassionate, consultative model of inquiry and report would seem undoubted, bearing in mind of course that these are ultimately issues for the Parliament.

Changes or “reform” in the law are also effected through judicial decision.

I have already noted that the definition of treason in the 1351 Act was expanded to accommodate “constructive treason” through judicial interpretation.

So, in 1516, courts were prepared to treat serious forms of public protest as a “constructive levying of war” against the King.²⁹ In his *Institutes*, Sir Edward Coke recorded that an “insurrection against the Statute of Labourers, for the enhancing of salaries and wages, was a levying of war against the King, because it was generally against the King’s law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do.”³⁰ The Statute of Labourers was

²⁹ Baker, above n 24 at 584.

³⁰ Coke, *Institutes*, iii at 10.

an early example of an industrial relations law, enacted to control the wages and employment of labourers who, following the Black Death, sought to take advantage of an unprecedented demand for labour in a labour-intensive agricultural economy.

We will recall that another of the principal definitions of treason in the *Statute of Treasons* of 1351 is compassing or imagining the death of the king. Blackstone states that the words “compassing or imagining” signify the purpose or design of the mind or will and not the carrying of such a design into effect. Since the statutory definition is concerned with acts of the mind it does, however, require some *open or overt act* to prove the offence.³¹

Within this definition, the courts held in 1477 that it was treason for a person to use magic to prognosticate the King’s death, on the ground that the King’s life might be shortened by the grief the prophesies caused him.³² We must, of course, bear in mind that “the practice of magic was a feature of everyday life”³³ at this period of history.³⁴

Almost 60 years later judges “declined to cooperate” when Elizabeth Barton, the Nun of Kent, was charged with slandering the King’s second marriage to Anne Boleyn. Elizabeth Barton was regarded by contemporaries as a holy woman with a gift for prophetic visions. After prophesying against the King’s second marriage and predicting that the King would soon die, she was arrested and examined by the King’s Council and in the Star Chamber. Notwithstanding the King’s desire for her to be prosecuted for treason, the Council and the judges refused to follow earlier precedents and it was left for

³¹ Blackstone, *Commentaries on the Laws of England*, Bk IV, ch 6 at 78.

³² Baker, *above n 24* at 581-582.

³³ *Ibid* at 593.

³⁴ We might also reflect that the ingenuity of the argument, whatever one thinks of its substance, will come as no surprise to a lawyer six centuries later.

the Parliament to attain her, which it duly did.³⁵

A constructive form of treason did, however, reappear in the indictment of Queen Anne (Boleyn) for treason. The Queen is said to have promised to marry one of her lovers if the King died and that she would never love the King in her heart, which on becoming known to the King caused him such grief that he suffered bodily.³⁶

I have so far discussed examples of offences against the government under the rubric of treason which, as we have seen, has also been used to prosecute what may now be described as sedition. The ALRC notes in its Issues Paper that seditious libel emerged as – some would say was created as – a distinct offence by the decision of the Star Chamber in 1606 in *De Libellis Famosis*.³⁷

The conciliar court considered that libels – whether against private persons or public figures – risked a breach of the peace and “may be the cause of shedding of blood.” In the case of libels against public figures, however, the charge was considered to be even more serious, as it concerned the “scandal of government”.³⁸

for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects? And greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice?

³⁵ This account is drawn from Baker, above n 24 at 585 and JK Van Patten, “Magic, Prophecy, and the Law of the Treason in Reformation England” (1983) 27 *American Journal of Legal History* 1 at 9.

³⁶ Baker, above n 24 at 582 and see (1976) 93 *Selden Society* 70.

³⁷ *Issues Paper* at [2.12].

³⁸ (1606) 5 *Co Rep* 125a at 251.

With these words, the Star Chamber provided a more expedient manner of prosecuting persons who used words or writing that could stir up opposition to the government.³⁹

The history of English judicial reform of offences against the government thus has instances that have expanded the reach of treason through judicial interpretation of a statute and the creation of new criminal offences where existing mechanisms proved inexpedient.

What of the Australian experience?

Trials for treason resulted from the events at the Eureka Stockade on 3 December 1854. The role of the jury in such prosecutions is a topic for another day, although it might be worth pondering the likely response of a jury as a *driver* for law reform, even if only to the extent that prosecution for certain crimes falls into disuse.

As well as prosecuting some of the surviving leaders of the Stockade for treason, the Crown prosecuted Henry Seekamp, the editor and owner of the *Ballarat Times* for sedition. He had, in the weeks before the Stockade, printed a series of inflammatory articles. The day before the bloody attack, his paper carried the following:⁴⁰

Instead therefore of the diggers looking for remedies where none can be found let them strike deep at the root of rottenness and reform the Chief Government. What if we lop off the branches from an unwholesome trunk. Only unwholesome branches can spring. We must undermine the tree and burn it off. The voice of the people must be raised for a free and British constitution and their wishes enforced by the strongest means.

³⁹ *Issues Paper* at [2.13].

⁴⁰ *Brief for the Prosecution against Henry Seekamp*, available at <<http://eureka.imagineering.com.au>>

In a trial presided over by the Chief Justice of Victoria, Sir William a' Beckett, Seekamp was found guilty of sedition and sentenced to six months imprisonment.

The following month, the first of the Eureka diggers stood his trial for treason. He was acquitted. There were twelve other trials. In each of them a Melbourne jury returned the verdict of "Not Guilty".⁴¹

Almost a century later, following the Second World War, Gilbert Burns, a member of the Communist Party of Australia, was summarily prosecuted, convicted and sentenced to six months imprisonment for uttering seditious words contrary to s 24D of the *Crimes Act*.⁴² At a public debate in Brisbane, and in response to an interjection and a demand for a "direct answer" to the question "In the event of a [third world war between Soviet Russia and the Western Powers] what would be the attitude and actions of the Communist Party in Australia?", Burns said "We would oppose that war. We would fight on the side of Soviet Russia".

Burns appealed from his conviction and sentence to the High Court. Dissenting from the majority conclusion that Burns had expressed a seditious intention, Dixon J noted that Burns was addressing himself to a contingency and his words were spoken as a hypothesis and that enmity, antagonism or disaffection against government or the Constitution was not the purpose of the question or the reply. For Dixon J, "it is not sufficient that words have been used upon which a seditious construction can be placed, unless on the occasion when they were used they really conveyed an intention on the part of the speaker to effect an actual seditious purpose"⁴³. That would accord with the position that was accepted at common law, that a seditious intention required an intention

⁴¹ See generally GL Fricke QC, "The Eureka Trials" (1997) 71 ALJ 59.

⁴² *Burns v Ransley* (1949) 79 CLR 101.

⁴³ *Ibid* at 116.

to incite people to violence or to create public disturbances and disorder.

The High Court was, however, evenly divided as to whether the words used expressed a seditious intention and the opinion of the Chief Justice accordingly prevailed. Latham CJ considered that the hypothetical element involved in the statement did not itself exclude the words used from the category of seditious words. The Chief Justice considered that Burns was putting forward a policy to be approved and put into effect and that “such advocacy is encouragement of and incitement to active disloyalty”⁴⁴. By discounting the context of Burns’ response to a hypothetical question, the reasons of the Chief Justice moved away from the common law requirement that there be a present intention to incite violence and disorder.

Although English judges had earlier held that a conviction for sedition required proof of subjective intention and required incitement to public violence or disturbance,⁴⁵ Latham CJ considered that it was unnecessary to consider the common law as Burns was charged with an offence under the statute. The effect of the Court’s decision was that the offence of sedition, as enacted by the Parliament in the *Crimes Act*, was broader than the common law offence and its decision has been sharply criticised for departing from the common law position.⁴⁶

It is uncontroversial that judicial decision-making develops the law and that, in so doing, necessarily changes the law. To speak of judicial decision-making as reforming the law is, of course, to invite controversy since the notion of “reform” carries so much with it. It also invites criticism as obscuring the importance of the narrow limits within which

⁴⁴ *Ibid* at 109.

⁴⁵ See eg *R v Collins* (1839) 9 C&P 456 at 461 (*Littledale J*); *R v Burns* (1886) 16 Cox CC 355 at 367; *R v Aldred* (1909) 22 Cox CC 1 at 4 (*Coleridge J*).

⁴⁶ See below at n 53.

judicial decision-making takes place. As Sir Anthony Mason has said⁴⁷

the law-making function of the courts is ... not a free-standing activity. It is an incident of a narrow adjudicative framework, based firmly on the existing corpus of judge-made law, even if, in appropriate situations, relevant policy considerations, whether identified by statute or not, are also taken into account.

Moreover, judicial decision making is informed only by the facts of the case and it is largely confined by the manner in which the parties have presented their case. Its proper boundaries are set by the case itself. It is as well to remember, too, that judicial decision-making can involve sharp differences of opinion within appellate courts at all levels, as my reference to *Burns* amply illustrates. Even where the principles are themselves well established their application to a particular case can provoke strong differences. Relevantly to the areas of law presently being discussed, the *application* of well established principles about the interpretation of statutes and presumptions against interfering with fundamental rights can lead to differences of opinion as the recent decision of the High Court in *Al Kateb v Godwin*⁴⁸ shows.

None of this is to suggest that judicial decision-making is deficient in its application to the development of the law, but if we are examining the processes of law reform from the perspective of durable, effective and possibly substantial change, we must accept that judicial decision-making is not directed to the end of law reform.

Before moving from an incremental mode of law reform to the institutional model of law reform represented by the ALRC, I want to touch on Royal Commissions and ad hoc committees of enquiry, two models that bring us closer to the modern law

⁴⁷ Sir Anthony Mason, "Law Reform and the Courts" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) at 315.
⁴⁸ (2004) 219 CLR 562.

reform agency.

First, Royal Commissions. In April 1983, Mr Ivanov, the First Secretary of the Soviet Embassy, was expelled from Australia after ASIO assessed that he was an officer of the KGB. The next month, the Hon Mr Justice Hope, a Judge of Appeal of the New South Wales Supreme Court was appointed a Royal Commissioner to inquire into Australia's Security and Intelligence Agencies. Hope JA was no stranger to ASIO's activities, having previously enquired into the organisation from 1974-1977.

In his Report of December 1984,⁴⁹ Hope JA examined the sedition offences in the *Crimes Act* and stated "these provisions require amendment"⁵⁰. Amongst other recommendations, he considered that "provision should be made to incorporate ... the common law requirement of an intention to create violence or public disturbance or disorder."⁵¹ This was a direct criticism of the decisions of the High Court in *Burns* and in *Sharkey*⁵² (another prosecution of a Communist Party member for sedition) and Hope JA concluded that "mere rhetoric or statements of political belief should not be criminal offences, however obnoxious they may be to constituted authority."⁵³

That recommendation was acted upon two years later – in 1986 – with the enactment of the *Intelligence and Security (Consequential Amendments) Act 1986* which inserted the words "with the intention of causing violence or creating public disorder or a public disturbance" into relevant sections of the *Crimes Act*.

⁴⁹ *Royal Commission on Australia's Security and Intelligence Agencies, Report on the Australian Security Intelligence Organization (1984)*.

⁵⁰ *Ibid* at [4.98].

⁵¹ *Ibid* at [4.99].

⁵² *R v Sharkey (1949) 79 CLR 121*.

⁵³ *Royal Commission on Australia's Security and Intelligence Agencies, above n 49 at [4.101]*.

This would seem a positive example of the process of law reform; one that is informed by dispassionate, public inquiry and implemented by the Parliament. There are other positive examples of law reform by Royal Commissions.

Royal Commissions are, however, usually set up to inquire into particular events and are usually expected to complete their work within a relatively short period. This stands in contrast to the usual institutional model of law reform.

Moreover, I agree with the observations of Sackville J that:⁵⁴

permanent law-reform agencies ... discharge their policy-making functions thoroughly and in a cost-effective manner. By comparison, the policy making functions of Royal Commissions tend to be incidental to their investigative and forensic responsibilities. Royal Commissions also tend to be expensive undertakings, not necessarily well-suited to policy making.

That is, the positive elements of law reform by Royal Commission can be secured in an institutional model for law reform whose process is directed to the task of policy-making rather than fact-finding and which also addresses concerns about cost.

Law reform has also been achieved via the recommendations of committees or inquiries established *ad hoc* to inquire into particular aspects of the law.

In February 1987, the Attorney-General, Lionel Bowen, requested the Rt Hon Sir Harry Gibbs, the Hon Ray Watson and Mr Andrew Menzies to conduct a wide-ranging review of Commonwealth criminal laws. The Terms of Reference requested that they inquire into, review and report as to the appropriate legislative means to consolidate and

⁵⁴ Justice Sackville, "Law Reform Agencies and Royal Commissions: Toiling in the Same Field?" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) at 286.

rationalise the criminal laws of the Commonwealth and recognised that it was to be a “major review” of Commonwealth criminal law.

As part of its review, the Gibbs Committee examined offences relating to the security and defence of the Commonwealth, including sedition.⁵⁵

Although noting that the 1986 amendments – made following the Hope Royal Commission – had significantly restricted the wide scope of the sedition provisions, the Committee nevertheless considered the definition of “seditious intention” to be expressed in archaic terms and to be misleadingly wide.⁵⁶

The Committee recommended that the sedition provisions be abolished and replaced with a provision that would make it a criminal offence to incite another person, by any means, to overthrow by force or violence, the Constitution or the established Government of the Commonwealth. The Committee made similar recommendations about interference with parliamentary elections and inciting violence in the community.

Justice Sackville, writing of such enquiries has observed that⁵⁷

obviously enough, the effectiveness of ad hoc enquiries in achieving reform is heavily dependent on the political will of the government receiving their reports to implement the recommendations, since the committees are normally disbanded on completion of their work.

This is apposite in relation to these recommendations, which were not acted upon at the time, although the Explanatory Memorandum to the Anti-Terrorism Bill (No 2) stated

⁵⁵ *Review of Commonwealth Criminal Law, Fifth Interim Report (1991)*.

⁵⁶ *Ibid* at [32.13].

⁵⁷ *Justice Sackville, above n 54 at 277*.

that the sedition offences had been updated “in line with a number of recommendations of Sir Harry Gibbs”.

It seems to me that recommendations are more likely to be implemented if a permanent body is charged with the task of making them. A permanent body is also well-placed to build upon its corporate experience in conducting past enquiries and making the best use of experienced staff.

This brings me to the Australian Law Reform Commission:

The ALRC is, of course, established by a statute of the Commonwealth Parliament and its functions are identified in that statute.⁵⁸ It is charged with reviewing Commonwealth laws “for the purposes of systematically developing and reforming the law”, particularly by “bringing the law into line with current conditions”, “removing defects in the law”, “simplifying the law”, “adopting new or more effective methods for administering the law and dispensing justice” and “providing improved access to justice”.⁵⁹

The Commission is constituted by a President, a Deputy President and full-time and part-time Commissioners,⁶⁰ all of whom are able to bring their extensive skills and diverse interests to the ALRC’s work.

The ALRC Act also provides that for the purposes of reviewing or considering anything that is the subject of a reference, the Commission may inform itself in any way that it thinks fit.⁶¹ The Commission has taken an appropriately broad view of its information-gathering function and has had, from the outset, a policy or practice of

⁵⁸ *Australian Law Reform Commission Act 1996 (Cth)*.

⁵⁹ *Ibid*, s 21.

⁶⁰ *Ibid*, s 6.

⁶¹ *Ibid*, s 38.

wide community involvement. It has achieved this through issues papers, discussion papers, invitations to make submissions, public hearings and wide consultation. Its Act requires its reports to be tabled in the Parliament.

This approach has been adopted in relation to its reference to review and report upon the sedition provisions of the *Criminal Code*. Although working within a much tighter time frame than is typically allowed for, the ALRC has already produced a comprehensive Issues Paper and has, as usual, adopted a policy of wide consultation.

This brief survey of the processes of law reform in the fields of treason and sedition highlights the advantages of the ALRC model, and certainly it has been a successful model if the adoption of the ALRC's recommendations is taken as a measure of success. Some 59% of the Commission's reports have been substantially implemented, 27% partially implemented, 3% are under consideration and 11% have not been implemented.⁶²

The strength of the ALRC model derives from its carefully established structure which is directed to ensuring that its recommendations are based on careful research and analysis and are not, and are not seen to be, reactive to specific events. As well, the Commission's processes of informing itself, provided for in the structure, ensure that the inputs include both scholarly analysis and a wide range of views from the public generally and from interest groups as well. The structure is also capable of adapting to highly specialised and technical subjects of great contemporary importance, such as genetics.⁶³

Unlike a Royal Commission or a Committee of Inquiry, a law reform agency established

⁶² ALRC, *Annual Report 2004-05*, ALRC 101 (2005) at 22.

⁶³ ALRC, *Genes and Ingenuity: Gene Patenting and Human Health*, ALRC 99 (2004); ALRC, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003).

on the ALRC model is permanent. It can thus develop institutional expertise and knowledge, including an understanding of the requirements and difficulties of policy making. Being permanent, it can develop an institutional reputation that can add weight to its recommendations. It can also monitor their implementation.

Finally, whilst independence is a characteristic that is not unique to the ALRC and like agencies, the importance of this characteristic should not be overlooked.

The characteristics that I have outlined, and the history of change to the law of treason and sedition over the past 650 years, provide a strong basis for concluding that a body such as the ALRC is best placed to undertake the task of reviewing the law in these fields and that the Commission's recommendations in its present reference will deserve the closest consideration.

The fact that the present processes of law reform in the field of sedition can be seen to represent something of a hybrid does not, I think, weaken this conclusion at all. This hybrid may indeed be especially strong on account of that fact. The description "hybrid" is founded on the circumstances that the Government proposed amendments to the law that were based in part on the recommendations of a Committee of Inquiry (the Gibbs Committee), that were then the subject of inquiry by a Committee of the Senate,⁶⁴ that were then enacted by the Parliament but which, in accordance with the recommendations of the Senate Committee have been referred to the ALRC for inquiry and report.

And if the ALRC's recommendations are not accepted? The structure that produces recommendations deserving of the closest consideration should also serve to ensure that if recommendations are not accepted this is because they are met with a reasoned case

⁶⁴ Senate Legal and Constitutional Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005).

of equal or greater force. One could hardly ask more of a model for the process of law reform.